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No. 470

SUPREME COURT OF THE UNITED STATES

W. A. MONCRIEF, JR. AND JOE I. KLABZUBA,
Petitioners

v.

PASOTEX PETROLEUM COMPANY,
A Delaware Corporation, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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No. 476

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

W. A. MONCRIEF, JR. AND JOE J. KUBZUBA,
Petitioners

v.

PASOTEX PETROLEUM COMPANY,
A Deleware Corporation, *Respondent*

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Pursuant to Rule 24(4) of the rules of this Court, Petitioners respectfully submit this Reply Brief to Respondent's Brief in Opposition to the Petition for Writ of Certiorari filed in the above-styled and numbered cause.

FEDERAL QUESTION JURISDICTION DID NOT VEST AS A RESULT OF RESPONDENT'S COUNTERCLAIM

The Respondent has abandoned its argument to the Courts below that the Act of 1926, 44 Stat. 239, conferred original jurisdiction in the District Court:

> "The Act of 1926 *was not an act vesting any jurisdiction in the Federal Court* but, rather, with respect to jurisdiction with which it was already vested, the purpose of the Act was to specify the procedure by which a final and conclusive judgment could be obtained." (Page 15 of Respondent's Brief in Opposition).

Furthermore, Respondent concedes that the complaint filed by the Petitioners did not state a cause of action arising "under the Constitution, laws or treaties of the United States." It rests jurisdictional investiture solely on its counterclaim (RCA 5-9, 59). Thus, the counterclaim must, in effect, be treated as an original complaint for purposes of testing the requirements for federal question jurisdiction. This Court has made it clear that such requirements are stringent and that access to the federal courts through federal question jurisdiction is narrow indeed.

In order for the counterclaim to state an independent jurisdictional basis, it must show, not only its origin in the laws of the United States, but that the disposition of the claim *could be resolved only by the construction of federal law*. The Court of Appeals did not consider the counterclaim as having presented such a question because it decided the case in accordance with the local law of Oklahoma. Likewise, the District Court retained jurisdiction, not because of the counterclaim, but by reason of the fact that the Indian was made a party defendant to the suit (RCA 34). The mere presence of the Indian as a party to the suit simply did not vest federal juris-

(Emphasis supplied throughout)

diction. (See Petition for Writ of Certiorari, pages 10-11).

There is no rule of law that has been more frequently expressed by this Court than the rule that Federal Courts are courts of limited jurisdiction. For that matter, *this Court has not hesitated, even on its own motion*, to deny its jurisdiction and that of all other courts of the United States where such jurisdiction does not affirmatively appear in the record. The Court's views in this regard were clearly stated in the case of *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379, 382; 28 L.Ed. 462, 464, as follows:

> "It is true that the plaintiffs below, against whose objection the error was committed, do not complain of being prejudiced by it, and it seems to be an anomaly and a hardship that the party at whose instance it was committed should be permitted to derive an advantage from it; but the rule, springing from the nature and limits of the judicial power of the United States, *is inflexible and without exception*, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. *On every writ of error or appeal the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.*"

IF FEDERAL QUESTION JURISDICTION IS PRESENT, THE CASE SHOULD BE RESOLVED IN ACCORDANCE WITH FEDERAL LAW

On this question, Respondent simply should not be permitted to "have its cake and eat it too." On the one hand, it asks this Court to approve Federal jurisdiction by reason of a Federal question involving the construction of Federal law, and then on the other hand, insists that the State law of Oklahoma can be used to decide the Federal question presented. As authority for this contention, it refers the Court to Title 28, U.S.C., Section 1652, which provides as follows:

> "§ 1652. *State laws as rules of decision.* The laws of the several states, *except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide*, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

This statute of course, is the new version of the *Rules of Decisions Act* which was a codification of this Court's opinion expressed in *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188. Its purpose, as is made clear by countless decisions of the Federal Courts, is to secure uniformity of decisions between State and Federal Courts where jurisdiction is *based on diversity of citizenship. King v. United Commercial Travelers*, 333 U.S. 153, 157; 92 L.Ed. 608, 611.

28 U.S.C., 1940 Ed., Section 725

The District Court concluded as a matter of law *that diversity of citizenship was absent* in this case (RCA 34). The Respondent admits that there *was no diversity* at page 10 of its brief to this Court.

The controlling issue involved here is the construction of the term clause of the Departmental Lease which is copied from a federal regulation (25 C.F.R. 174.5) which in turn had its genesis in an Act of Congress. If there is Federal jurisdiction in this case, it is because of a Federal question. If there is a Federal question in the case, it is because the problem before the Court concerns the construction of a Federal regulation. It ineluctably follows, therefore, that Federal law and not State law should control.

Respondent makes no effort to cite any authority to the Court on the question of which law applies. It merely says that the question involved is one of title and that the law of the state where the land lies governs. If this be true, we ask again—where is the Federal question that gave jurisdiction to the District Court in the first place?

THE SECRETARY OF INTERIOR HAS THE JURISDICTIONAL POWER TO DETERMINE THIS CONTROVERSY AND FEDERAL JURISDICTION IS LACKING IN THE ABSENCE OF SECRETARIAL ACTION

Respondent makes the assertion that Congress itself lacks the power to confer upon the Secretary of Interior the jurisdictional authority to determine whether or not the Departmental Lease has expired by its own terms. In answer, we simply refer the Court to the elaborate federal regulations covering such leases issued by the Department of Interior pursuant to Congressional action. Pertinent sections of the regulations are discussed in our Petition. Among other things, the Secretary has discretion over the sale of such leases; he has complete supervision over the operations conducted on them; he has power to cancel such leases and impose penalties against the lessees; and he has the power to expire the leases where the terms are not complied with. We appended to our Petition one of his decisions where he expired a Departmental Lease (on facts similar to this case) covering Wind River Tribal lands for failure of production in paying quantities.

After having stated that the Secretary of Interior lacks jurisdictional power over Departmental Oil and Gas Leases, the Respondent nevertheless (and with remarkable inconsistency) repeatedly urges that Secretarial supervision *has never been relinquished as to the Departmental Lease here involved*. For example,

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on page 3 of its brief to this Court, the following statement is made:

> "The Departmental lease executed by the restricted Indian allottee on restricted allotted lands during her lifetime and approved by the Secretary of Interior and *admittedly under federal supervision and from which federal restrictions have never been relinquished*; . . ."

At page 9 of its brief, Respondent says:

> "Departmental supervision *has never been relinquished on this lease* insofar as it covers the land here involved; . . ."

And again on the same page, Pasotex declares:

> "Her [referring to the Indian] interest in this land and the Departmental lease is *subject to and under Departmental supervision.*"

On page 16 of its brief, Respondent poses this question:

> "Which of [the] two leases is valid—a Departmental Oil and Gas Lease on restricted Indian lands of a restricted member of the Choctaw nation which lease *is under Departmental supervision and over which such Departmental supervision has never been relinquished*,—or a lease on the same lands over which the Respondent has no supervision subsequently executed by a restricted Indian heir under County Court approval; . . ."

Finally, on page 27 of its brief, Pasotex flatly declares:

> "The Departmental lease was executed and its

> validity *was dependent upon the approval of the Secretary of the Interior and the Secretary of the Interior still recognizes that lease to be valid and subsisting and in accordance with its terms has supervision over operations thereunder.*"

These statements generously support one of the points that Petitioners have been endeavoring to make. Simply stated, it is this: Under applicable federal regulations, issued pursuant to Congressional mandate, the Secretary has the power to decide this controversy. Assuming that it is a *discretionary* power and one which Petitioners could not force him to exercise, the situation in this case is that *he has acted* and *has exercised* his *discretionary power* in approving Respondent's Departmental Lease.

We do not wish to quibble with Respondent as to whether or not the Department of Interior actually approved the lease covering the same piece of ground under which Petitioners assert a claim of interest. In this connection, we merely observe that the Petitioners' lease was obtained at a judicial sale in the County Court of Love County, Oklahoma; *that said County Court was acting as an agency of the Department when it approved the lease;* that such lease was advertised for competitive bidding in the Marietta Monitor of Love County, Oklahoma, at the instigation and as a result of an action initiated by the Respondent and finally that a United States District Attorney appearing for the Government was present at the courthouse when the lease was executed in favor of Petitioners. What we do wish to emphasize to the Court, however, is that *Respondent's Departmental*

Lease was approved by the Secretary, and is, by Respondent's own insistance, still under Departmental supervision. Under these circumstances, we urge that the Secretary has the duty to determine whether or not such lease expired under its own terms and *that Federal jurisdiction does not vest in the District Court until the Secretary has made his finding.*

Respondent has categorically stated to this Court that the Secretary "still recognizes [its] lease to be valid and subsisting." If this be true, the Secretary has never made this position known to Petitioners. We urge the Court to remand this dispute to the Secretary for a decision and if he rules in the manner Respondent so confidently predicts, no possible harm can result to Respondent and the jurisdictional defects in this case will be removed. In any event, we beseech the Court to at least *invite* the Secretary's views on this important question. We earnestly believe that the Court is entitled to this information and that the Secretary should cheerfully furnish it upon the Court's request.

The Respondent urges that the judgment of the United States District Court *binds* the Secretary of the Interior because of the Act of 1926, which is cited in the Appendix to our Petition beginning at Page 30. Such an argument *assumes* that there was Federal jurisdiction in the District Court to begin with because if Federal jurisdiction is lacking, this Act would be rendered wholly inapplicable, and by Respondent's own admission (Respondent's Brief, Page 15), the Act has absolutely nothing to do with "vesting any jurisdiction in the Federal Court."

THE CASE IS IMPORTANT IN THE ADMINISTRATION OF DEPARTMENTAL OIL AND GAS LEASES ON PUBLIC AND INDIAN LANDS

Respondent says that the case is not important because lands owned by members of the Five Civilized Tribes are located only in Oklahoma and that the question of uniformity of decisions between Federal Courts is not involved. It also points out that there are many different types of oil and gas leases and regulations with respect to the leasing of public and other Indian lands. The point is, that the term clause of the Departmental Lease here involved, and the term clauses of leases involving public lands as well as leases on lands of Indian Tribes other than the Five Civilized Tribes, contain substantially the same language. We have set forth in the Appendix hereto (infra, pages 14 & 15) the term clauses of several of these leases. The language is taken from the applicable Federal regulations. The Court will at once observe the similarity between them.

Such regulations generally require that the lease be issued for a specified period of time and "as much longer thereafter as oil and or gas is produced in paying quantities." The Department of Interior has uniformily construed such leases to be completion leases that require a well to be completed capable of producing oil or gas in paying quantities prior to the expiration of the primary term. Therefore, the decision of the Court of Appeals in this case is *exactly opposite* from Departmental decisions and the decisions by other Federal Courts involving the construction

of almost identical lease language. There are hundreds of such leases covering thousands of acres of land located in many states.

UNDER BOTH FEDERAL AND STATE LAW THE DEPARTMENTAL LEASE EXPIRED AT THE EXPIRATION OF ITS PRIMARY TERM FOR LACK OF PRODUCTION IN PAYING QUANTITIES

The Respondent makes no effort to distinguish the decisions of the Department of Interior and the Federal Courts cited in our Petition to the effect that Federal leases, such as the Departmental Lease, have been consistently construed to be completion leases. Neither does it deny that the overwhelming weight of authority under State law is to the same effect. It contents itself on this point by saying that such cases are "beside the point." Pasotex repeatedly asserts that the District Court made a finding of fact that oil was actually produced in the Brannan well prior to the expiration of the primary term. What the Court really found was that the well *was physically incapable of production* until long after the primary term had expired. The Court said:

> "There was no drilling in the [Brannan] well subsequent to June 9, 1958, *and thereafter* the casing was set and said well equipped for production; *the first gas and gas condensate produced through the permanent equipment in the well affixed thereto for production purposes was on June 21, 1958.* Condensate was sold from such well, which was produced while the well was testing between June 21 and June 25, 1958,

inclusive, and the production was in paying quantities." (RCA 34).

Respondent further says at page 5 of its brief that the Court concluded as a matter of law that the well involved was not only commenced, but completed prior to the expiration of the primary term. In another place in its brief (page 22), Respondent said that the Departmental Lease *expressly* provided the Lessee had the right to "commence" such a well during the term of the lease. These statements are simply inaccurate and the Record so reflects. The Court of Appeals declared that the well was not completed until sometime after the primary term had expired, and the Departmental Lease itself does not even contain the word "commence" or "commencement."

Finally, at page 2 of its brief, Respondent says that the Departmental Lease was approved by the Secretary of the Interior on June 12, 1948, for a term of ten (10) years. The approval by the Secretary of Interior actually occurred on June 10, 1948 (RCA 18). Therefore, on June 9, 1958, the day upon which Petitioners urge that the Departmental Lease expired, Respondent had not produced a cubic foot of gas or a barrel of condensate from the Brannan well, and for that matter could not, because casing and producing equipment had not even been installed to render the well capable of production.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

TITLE 25, CODE OF FEDERAL REGULATIONS

Part 171—Leasing of Tribal Lands for Mining.

"§ 171.10 *Term of leases.* Mining leases may be made for a specified term not to exceed ten years from the date of approval by the Secretary of the Interior, or his authorized representative, and as much longer as the substances specified in the lease are produced in paying quantities."

Part 172—Leasing of Allotted Lands for Mining.

"§ 172.12 *Term of leases.* Mining leases may be made for a specified term not to exceed ten years from the date of approval by the Secretary of the Interior, or his authorized representative, and as much longer as the substances specified in the lease are produced in paying quantities."

Part 174—Leasing of Restricted Lands of Members of the Five Civilized Tribes, Oklahoma, for Mining.

"§ 174.5 *Term of oil and gas leases.* Oil and gas mining leases which require the approval of the Secretary of the Interior may be made for periods of ten years from the date of approval of lease by the Secretary of the Interior and as much longer thereafter as oil and or gas is produced in paying quantities."

TITLE 43, CODE OF FEDERAL REGULATIONS

Part 192—Leasing of Public Lands for Oil and Gas

"§ 192.40 *Classes and terms.* All leases, except those issued as renewals of 20-year leases, will be issued for a primary term of five years and so long thereafter as oil or gas is produced in paying quantities."